UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

PETER J. HOGAN and
BARBARA A. HOGAN,
Plaintiffs,

v. CA No. 00-483-T

CONSECO FINANCE SERVICING
CORP., formerly known as
Green Tree Financial Servicing
Corporation and ABC Coach
Finance,
Defendant.

MEMORANDUM AND ORDER

ERNEST C. TORRES, Chief United States District Court Judge.

Peter J. Hogan and Barbara A. Hogan ("the plaintiffs") brought this purported class action against Conseco Finance Servicing Corporation ("Conseco") for alleged violations of the Truth in Lending Act, 15 U.S.C. §§ 1601, et seq. ("TILA"), and its implementing regulation, Federal Reserve Board Regulation Z, 12 C.F.R. § 226.

Conseco has moved to compel arbitration pursuant to an arbitration clause contained in one of two notes signed by the plaintiffs in connection with the refinancing of their home and to stay this action pending resolution of the arbitration.

For reasons hereinafter stated, the motion to compel arbitration is granted and the case is dismissed without prejudice

to either party's right to bring a subsequent action to enforce or vacate any arbitrator's award that may be made.

Background

The complaint alleges that, in October 1998, the plaintiffs refinanced their home by borrowing money from Conseco in order to pay off an existing home loan. Pursuant to the refinancing, the plaintiffs executed two promissory notes, one in the amount of $126,000 and one in the amount of $15,500. Each note was secured by a mortgage and separate TILA disclosures were provided for each note.

The plaintiffs claim that making two loans and providing separate disclosures for what they contend was a single transaction refinancing residential real estate violated TILA's requirement that disclosures be clearly and conspicuously grouped together in one document. Compl., ¶¶ 1, 13-14; Pls.' Memo. in Opp'n to Defs.' Demand for Arb. and Stay of Proc., at 4.

It is undisputed that one of the promissory notes provides that "[a]ll disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract . . . shall be resolved by binding arbitration," and that there is no such provision in the other note. Citing that provision, Conseco has moved, pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 et seq., to compel arbitration of this dispute and to stay this action pending resolution of the

arbitration.

In opposing Conseco's motion, the plaintiffs argue, *inter alia* that:

1. The arbitration agreement was procured by undue influence and fraud because, when the notes were signed, Mrs. Hogan was hospitalized and experiencing severe distress, and the plaintiffs did not read the note containing the arbitration provision because Conseco represented that its terms were identical to the terms of the other note.
2. The claimed TILA violation gives them a right to rescind the notes and rescission would void any arbitration provision contained in the notes.
3. In any event, the arbitration clause is unenforceable because it conflicts with the provisions of TILA.

These arguments are internally inconsistent, contrary to the overwhelming weight of authority, and/or previously have been made by plaintiffs' counsel and expressly rejected by other courts.

Arbitrability - Standard of Review

In deciding whether a dispute is subject to arbitration, a court first must "determine whether the parties agreed to arbitrate that dispute." Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985). In light of "the federal policy favoring arbitration . . . any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." Id.

(quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983)). Generally, "arbitration will be ordered 'unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'" Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 723 F.2d 155, 159 (1st Cir. 1983) (quoting United Steelworkers of Am. v. Warrior and Gulf Navigation Co., 363 U.S. 574, 582-83 (1960)), rev'd on other grounds, 473 U.S. 614 (1985).

The policy favoring arbitration finds expression in the FAA, which makes arbitration provisions "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract" and directs federal courts to order arbitration of matters subject to an arbitration agreement and to stay suits brought with respect to such matters. 9 U.S.C. §§ 2-4.

Discussion

I. The Undue Influence and/or Fraud Claim

The plaintiffs' claim that the arbitration provision is void because it was the product of undue influence and/or fraud is inconsistent with their characterization of this suit as a class action. Determining Mrs. Hogan's emotional state, whether she was coerced by Conseco and what representations, if any, Conseco made to the plaintiffs, present questions of fact that are unique to

this particular transaction and are not common to the putative class that the plaintiffs purport to represent.

Moreover, contrary to the plaintiffs' contentions, the issue of whether fraud bars enforcement of the arbitration clause is, itself, arbitrable. In Prima Paint Corp. v. Flood Conklin Manufacturing Co., 388 U.S. 395, 402-3 (1967), the Supreme Court held that, although a claim that a particular arbitration clause was induced by fraud may be adjudicated by a federal court, a claim that the contract containing the arbitration clause was induced by fraud must be submitted to arbitration unless the parties have expressed a contrary intent.

Here, the plaintiffs make no claim that the arbitration clause, itself, was procured by duress or fraud. They do not allege that Mrs. Hogan was coerced into agreeing to arbitration, or that any representations were made about arbitration. Nor is there any indication that the parties intended to exclude from arbitration disputes about the validity of their agreement. The arbitration clause applies broadly to "[a]ll disputes, claims or controversies arising from or relating to this contract or the relationships which result from this contract, or the validity of this arbitration clause or the entire contract" including "all disputes arising under case law, statutory law and all other laws." Accordingly, the claim that the arbitration clause is unenforceable because it is the product of fraud or duress must be submitted to

arbitration.

II. The Rescission Claim

The plaintiffs seek to rescind their loans agreements on the ground that the loan disclosures that they received were not accurate, clear, and conspicuously displayed on one document as required by TILA. Compl. ¶¶ 5, 13; Pls.' Mem. at 4-5. They argue that rescission would void the entire contract between the parties and they cite Lummus Co. v. Commonwealth Oil Ref., 280 F.2d 915 (1st Cir. 1960) for the proposition that "[i]f the entire contract is rescinded, the arbitration clause cannot be affirmed on its own - it stands and falls with the rest of the agreement." Pls.' Mem. at 5. However, in their initial memorandum, plaintiffs' counsel, inexplicably, fail to mention that the Supreme Court has expressly rejected that proposition. Prima Paint, 388 U.S. at 402-404 (discussing Lummus as representing one side of a split among the circuits regarding severability of arbitration clauses and finding in favor of the opposing view).

In addition to being inconsistent with Prima Paint, the plaintiffs' argument also is at odds with the First Circuit's decision in Union Mutual Stock Life Insurance Company of America v. Beneficial Life Insurance Company, 774 F.2d 524 (1st Cir. 1985). In that case, the Court cited the "severability doctrine" set forth in Prima Paint and held that a claim for rescission of an entire contract would not prevent arbitration of the claim pursuant to an

arbitration clause in the contract. Id. at 529 (citing Prima Paint, 388 U.S. at 402-404).

None of this should come as any surprise to the plaintiffs because a virtually identical argument made by the same counsel who represent the plaintiffs in this case, was rejected by Judge Lisi in Large v. Conseco Fin. Servicing Corp., No. 01-140-ML, slip op. at 4-5 (D.R.I. July 26, 2001).

III. The Conflict with the TILA Claim

The plaintiffs' final argument is that enforcement of the arbitration clause would thwart the purpose of TILA by precluding class actions that are "specifically provided for" by TILA and which an aggrieved party has a non-waivable right to bring. That argument fails for several reasons.

First, TILA does not specifically provide for class actions. As the court noted in Johnson v. West Suburban Bank, 225 F.3d 366, 371 (3d Cir. 2000), "[t]hough the [TILA] statute clearly contemplates class actions, there are no provisions within the law that create a right to bring them." Section 1640, upon which the plaintiffs rely, simply provides that "in the case of a class action," damages are capped at the lesser of $500,000 or 1 % of the creditor's net worth. 15 U.S.C. § 1640(a)(2)(B) (emphasis added).

Second, it is well established that "even claims arising under a statute designed to further important social policies may be

arbitrated because 'so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum,' the statute serves its functions." Green Tree Fin. Corp. v. Randolph, 531 U.S. 79, 90 (2000) (quoting Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 28 (1991)). Whether a particular statutory claim is subject to arbitration turns on whether the parties agreed to arbitrate; and, if so, "whether Congress has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." Id. Here, the plaintiffs have failed to identify any statutory claim or right that they would be unable to vindicate through arbitration. Nor can they point to anything in TILA or its legislative history that suggests a Congressional intent to preclude arbitration of TILA claims. See Johnson, 225 F.3d at 371-373.

Last, but not least, arguments similar to the one advanced here have been consistently rejected by other courts. See e.g., Bowen v. First Family Fin. Serv., Inc., 233 F.3d 1331, 1337-38 (11th Cir. 2000) (agreeing with Johnson); Marsh v. First USA Bank, 103 F. Supp. 2d 909, 923-24 (N.D. Tex. 2000); Thompson v. Illinois Title Loans, Inc., No. 99-C-3952, 2000 WL 45493, at *4 (N.D. Ill. 2000). Indeed, in Johnson, the Third Circuit rejected an identical argument made by counsel for the plaintiffs in this case. See Johnson, 225 F.3d at 371, 377-378.

IV. The Defendant's Motion

It is clear from what already has been said that, under § 4 of the FAA, the defendant is entitled to an order directing arbitration of the plaintiffs' claims. It is equally clear that, at the very least, § 3 would require a stay of any further proceedings pending the outcome of such arbitration.

However, when all of the issues in a case are arbitrable, a court has discretion to dismiss the case in lieu of staying it. Bercovitch v. Baldwin School, Inc., 133 F.3d 141, 156 n.21 (1st Cir. 1998); Alford v. Dean Witter Reynolds, Inc., 975 F.2d 1161, 1164 (5th Cir. 1992); Sparling v. Hoffman Constr. Co., 864 F.2d 635, 637-38 (9th Cir. 1988); Large v. Conseco Finance Servicing Corp., No. 01-140-ML, slip op. at 6 (D.R.I. July 26, 2001). Under such circumstances, a stay would serve no purpose because there is no issue left for the Court to decide. Once an award is made, there may or may not be an issue for the Court to decide. Because of the deference given by the FAA to arbitration awards, such awards are seldom challenged. However, if the losing party fails to abide by the award, the prevailing party could bring an action seeking to enforce the award. Alternatively, the losing party could bring an action to vacate the award. In either event, the issues raised could be litigated at that time. Holding this case in abeyance in anticipation of a dispute that might never arise would accomplish nothing. Accordingly, this Court exercises its discretion to dismiss this case in lieu of

staying it.

Conclusion

For all of the foregoing reasons, the defendant's motion to order arbitration is granted, and the case is dismissed without prejudice to either party's right to bring a subsequent action to enforce or vacate any arbitrator's award that may be made.

IT IS SO ORDERED:

_____

Ernest C. Torres
Chief Judge

Date: , 2002